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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 784

EVELYN CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion, findings of fact and conclusions of law of the United States District Court for the Eastern District of Louisiana (R. 108-113) are reported at 75 F. Supp. 181. The opinion of the Court of Appeals for the Fifth Circuit (R. 119-126) is reported at 172 F. 2d 500.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 11, 1949

(R. 127). A petition for rehearing was denied on April 6, 1949 (R. 139). The petition for a writ of certiorari was filed on May 12, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether, under the Federal Tort Claims Act, the United States has assumed liability for damages caused by the negligent act of a member of its military or naval forces, where, at the time the accident occurred, the serviceman, who had temporarily left the troop train on which he was being transported while it was stopped at a station, for purely personal reasons, was returning thereto.

STATUTE INVOLVED

The pertinent provisions of the Federal Tort Claims Act[1] are set out in the Appendix, *infra*, pp. 15-16.

STATEMENT

On April 27, 1946, at about 10:30 p.m., petitioner was conversing with four other people on a street sidewalk in Baton Rouge, when a group of sailors

[1] The Federal Tort Claims Act (60 Stat. 842, 28 U. S. C. 921 *et seq.*) was repealed, and its provisions were revised and reenacted into law as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, effective September 1, 1948 (Pub. Law 773, 80th Cong., 2d sess.). Section 39 of the repealing act provides that existing rights and liabilities shall not be affected by the repeal. Since the case at bar arose prior to the repeal, it appears that any rights which petitioner may have against the United States herein, are governed by the Federal Tort Claims Act as it existed at the time of the repeal. It is the former provisions of the Act, therefore, which are set out in the Appendix, *infra*, pp. 15-16.

came running down the sidewalk headed in the direction of the railroad station approximately one block away (R. 10, 32-33, 109). As described by petitioner, these sailors "* * * came running out of bars and hotels and screaming and hollering and running * * * and just ran into me and knocked me down" (R. 33). At the time of the accident, the sailors were not under the command of any officer, but "were running pell mell" down the street in a "very disorderly" fashion (R. 49, 95-96, 104). As the result of this accident, petitioner suffered physical injuries.

These sailors were part of a larger group traveling on a Navy troop train, which had stopped in Baton Rouge on the night of April 27, 1946, between 9:30 and 10:30 p.m., to be iced and serviced by the carrier (R. 9, 109). At the time of the accident, the sailors were attempting to reach and board the train which was then slowly moving out of the station (R. 110, 121). There was no evidence "as to how or why they got off the train or how or why they were running in such disorderly fashion to catch it [and] none that they were under command or orders of any kind while off the train" (R. 121).

On April 21, 1947, petitioner brought suit against the United States under the Federal Tort Claims Act (R. 2-4). Her complaint alleged that the "person or persons running into [her] and knocking her down" were unknown to her but

that they were wearing the uniform of enlisted men in the United States Navy and "were acting in line of duty at the time" of the accident (R. 3).

The United States, in its answer, denied the material allegation of the complaint, alleged contributory negligence on the part of petitioner, and also denied that the petitioner's injuries resulted from the act of any employee of the Government while acting within the scope of his employment under circumstances where the United States, if a private person, would be liable (R. 5-6).

After the trial, the district court found that the identity of the sailor who ran into petitioner could not be established but that he was one of the sailors being transported on the Navy troop train, that he was negligent and that petitioner's injuries were proximately caused by such negligence (R. 109, 111). The district court ignored the Government's contention that the sailor was not acting within the scope of his employment in circumstances where a private employer would be liable. Ruling that it was sufficient for the purpose of the Federal Tort Claims Act that the sailor was generally "acting in line of duty" at the time of the tort, the district court held that "the United States of America is liable therefor" and accordingly entered a judgment for $21,018.80 against the United States (R. 111, 114). On appeal, the court of appeals, rejecting each of the contentions here reasserted by petitioner, reversed

the district court and rendered judgment for the United States (R. 127). It held that the ordinary rules of *respondeat superior* applied and that liability may not be imposed upon the United States under the Federal Tort Claims Act for a tort committed by military personnel, unless the tort is one for which a private employer, under similar circumstances, would be liable, even though the servicemen might be held for disability or compensation benefit purposes to be "in line of duty" at the time (R. 125-126).

ARGUMENT

Under the Federal Tort Claims Act the United States has assumed liability for the negligence of "any employee of the Government while acting within the scope of his office or employment" only to the same extent that a "private individual" would be liable (Section 410(a), Appendix, *infra*, pp. 15-16). Petitioner admits that this language measures and limits governmental responsibility for the torts of civilian employees but argues that the Act, as far as torts of military personnel are concerned, makes the United States answerable for their negligent conduct outside, as well as within, the scope of their military employment, so long as they may be said, in some general sense, to be "in line of duty" at the time. The court below, in refusing to apply the Act to conduct of military personnel outside the scope of their employment, held that petitioner's view finds no support in the

Act and would, if accepted, "subject the Government to fantastic claims of liability having no relation to the doctrine of *respondeat superior,* as it is known and applied, in determining the liability of private persons" (R. 125). Since this decision is correct and presents no conflict, review by this Court, we submit, is unwarranted.

1. As stated by the court below, the "whole structure and content of the Federal Tort Claims Act makes it crystal clear that * * * Congress was undertaking with the greatest precision to measure and limit the liability of the Government, under the doctrine of *respondeat superior.* * * *." (R. 124). Section 410(a) expressly predicates liability of the United States on the negligence of an employee "acting within the scope of his office or employment." Thus, the Act adopts, with respect to the United States, the recognized rule that an employer is responsible for the acts of his employee, within the scope of his employment, while engaged in his employer's business, and done with a view to the furtherance of that business and his employer's interest. See 1 Shearman and Redfield, Law of Negligence, p. 351 (Rev. ed. 1941).[2]

[2] Louisiana statutory law accords with this general rule and specifically provides that an employer may be held answerable only for those torts of his employees which arise as a result of the "exercise of the functions in which they are employed" (Section 2320, La. Civil Code, Dart. 2d ed., 1945, Revision of 1870). See also *Oliphant* v. *Town of Lake Providence,* 193 La. 675; *Gallaher* v. *Ricketts,* 191 So. 713 (La.); *Boyce* v. *Greer,* 15 So. 2d 404 (La.); *Whittington* v. *Western Union Tel. Co.,* 1 So. 2d 327 (La.).

In the instant case, so far as the record reveals anything, it shows that the sailor was in town for personal purposes, was not engaged in his employer's business, and certainly was not furthering his employer's interests at the time of the accident. If the same circumstances had occurred during a change of station in private employment, there is no doubt that the employer would be immune from liability. The bare terms of the Act, therefore, in requiring application of the well-established *respondeat superior* test, demonstrate the correctness of the decision of the court below.

2. In seeking to avoid the application of the normal *respondeat superior* test, petitioner's principal argument is that Section 402(c) of the Federal Tort Claims Act defines "acting within the scope of employment" to mean "acting in line of duty" in case of military personnel, that the phrase "line of duty" has been construed very liberally so as to include acts outside, as well as within, the "scope of employment," and this liberal construction must be mechanically applied to the Federal Tort Claims Act so as to make the United States liable for practically every tort committed by a soldier or sailor (Pet. 8-18; R. 122-123). But this argument, aside from ignoring the significance of the addition of the word "acting",[3] overlooks

[3] The statutes and decisions dealing with the concept of "in line of duty" for compensation or dependency benefit purposes, treat it as a status, not requiring any affirmative action on the

the frequent need for attributing different meanings to the same phrase when used in different statutes having totally distinguishable backgrounds. Moreover, the history and policy of the Act show that such a broadening of the liability of the United States for torts of its military personnel, unrelated to their duties, was never intended by Congress.

a. It is, of course, not unusual for the same words to be used with different meanings in different acts, and in fact, even in the same act. *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 433. This is especially true in legislation affecting servicemen. For example, this Court has held that a Navy paymaster's clerk is not an "officer" within the meaning of that word as used in one statute (*United States* v. *Mouat,* 124 U. S. 303), but, in a decision handed down the same day, held that such a clerk was an "officer" for the purposes of a different statute (*United States* v. *Hendee,* 124 U. S. 309). Such results, far from being inconsistent, simply effectuate the different legislative intent underlying each of the statutes. Cf. *Boston Sand Co.* v. *United States,* 278 U. S. 41, 48; *United States* v. *Dickerson,* 310 U. S. 554, 561; *Mitchell* v. *Cohen,* 333 U. S. 411.

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serviceman's part or close association with the principal's business, such as the phrase "*acting* in line of duty" (the equivalent of "acting within the scope of employment") implies. (Emphasis supplied.)

Here, petitioner's attempt to invoke the broad meaning given to the phrase "line of duty" in legislation granting benefits to servicemen or their dependents for any injury or death incurred during the serviceman's period of military service disregards the basic reason for that broad meaning. Congress has broadened the "line of duty" concept in such legislation to reward servicemen for the sacrifices caused by their separation from civilian life, and for the understandable and desirable purpose of making benefit payments to such servicemen and their dependents in all situations, except where the injury or death for which benefits are claimed (1) was the proximate result of the serviceman's own misconduct or (2) occurred while he was deserting the service or under confinement by sentence of a military or civil court. Act of September 27, 1944, 58 Stat. 752; see 32 Op. A. G. 12 (1919).[4] Thus, even injuries sustained by a soldier in the course of his remunerative employment for a private concern while he was on furlough from his military duties have been held to have been incurred in the line of his duty with the armed forces, for the purpose of awarding him pension benefits. (Decisions of the Administrator of Veterans Affairs, vol. 1, p. 1470). While such a liberal interpretation of

[4] Similar considerations account for the results reached in the workmen's compensation cases cited by petitioner (*Globe Indemnity Co.* v. *Forrest*, 165 Va. 267; *Doke* v. *United Pacific Insurance Co.*, 15 Wash. 2d 536) and, likewise, demonstrate their inapplicability here. See also *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 479.

line of duty is justifiable to prevent a deprivation of veteran's pension benefits, it obviously has no basis in totally different legislation, such as the Federal Tort Claims Act where the relationship of the serviceman to the United States is important only for the purpose of determining whether the United States should be held answerable to a third person for the serviceman's torts.[5]

b. Nothing in the legislative history of the Federal Tort Claims Act warrants a carry-over of the broadened "in line of duty" meaning. To the contrary, that history makes it reasonably clear that Congress never intended that the phrase "line of duty," in Section 402(c), would be the means of imposing liability on the United States for torts committed by military personnel outside the scope of their employment. In fact, Congress probably added the phrase "line of duty" to the "scope of employment" definition in Section 402(c), because soldiers and sailors are generally not considered to be employees of the United States and hence the phrase "scope of employment" would have uncertain and awkward application to their conduct. This was expressly recognized by Congress in specifically defining "employee of the government," in

[5] Apart from veterans benefit legislation, where there is a direct need for expanding the "line of duty" concept so as to award benefits to servicemen and their dependents, the phrase "line of duty" has frequently been restricted to acts performed in the discharge of required employment duties and has been limited to performance of the work of employment. *Allen* v. *Burlington, C. R. & N. R. Co.*, 57 Iowa 623, 627; *Mesker* v. *Bishop*, 56 Ind. App. 455, 464.

Section 402(b) of the Federal Tort Claims Act, to mean "members of the military or naval forces of the United States." Further recognition was manifested in the committee reports accompanying several of the earlier tort claim bills which incorporated language similar to that appearing in Section 402(b) and (c). See H. Rep. 667, 69th Cong., 1st sess., on S. 1912, p. 6; H. Rep. 286, 70th Cong., 1st sess., on H. R. 9285, pp. 6-7; H. Rep. 2800, 71st Cong., 3d sess., on H. R. 17168, pp. 12-13.

These definitions, it was pointed out at hearings on the predecessor bills, were inserted to "make it clear that the act covers all Federal agencies, including corporate instrumentalities, and all Federal officers and employees, *including members of the military and naval forces* and temporary and uncompensated employees." (Emphasis supplied). Hearings before the House Committee on the Judiciary, 77th Cong., 2d sess. on H. R. 5373 and H. R. 6463, p. 7. The desire of Congress to employ apt language, in making certain that the Act would not be held inapplicable to torts of military personnel, should not, as pointed out by the court below, be wrenched "out of its context" so as to escape the Act's emphatic basing of the liability of the United States on the normal *respondeat superior* relationship (R. 125).

c. All of the reported decisions on this problem under the Tort Claims Act are in accord with the court below in refusing to expand the "line of duty" criterion of the Act to include conduct not

deemed within the scope of the military tortfeasor's employment. *Rutherford* v. *United States*, 73 F. Supp. 867 (E.D. Tenn.), affirmed *per curiam*, 168 F. 2d 70 (C. A. 6); *Cropper* v. *United States*, 81 F. Supp. 81 (N.D. Fla.); see also *Fries* v. *United States*, 170 F. 2d 726 (C. A. 6), certiorari denied, 336 U. S. 954; *Long* v. *United States*, 78 F. Supp. 35 (S.D. Cal.). The Supreme Court of Canada, in interpreting a statute similar to the Federal Tort Claims Act, has also employed the normal *respondeat superior* test in determining liability of the Crown to third persons for the torts of military personnel. *King* v. *Anthony*, Canada Law Reports (S. C. 1946) 569.

3. Equally lacking in merit is the contention that the United States is liable because the person alleged to have injured the petitioner was dressed in the uniform of a sailor of the United States Navy (Pet. 19). This argument also overlooks the fact that the United States may be liable under the Tort Claims Act only where the negligence complained of is that of a federal employee acting within his "scope of employment." The mere fact that a naval uniform was worn, no more than the mere fact that a vehicle involved in an accident was owned by the United States and being used with its permission, would be insufficient to make the United States liable under the Act. *Hubsch* v. *United States*, 174 F. 2d 7 (C. A. 5). Moreover, the cases cited by petitioner at the most stand for the propo-

sition that a person wearing the uniform or livery of a particular employer is presumed to be engaged on the employer's business, nothing else appearing. Here it is clear that the sailors who had left the troop train had gone to the city for personal recreational purposes. As the district court remarked "They wanted relaxation and, also, to go to eating and refreshment spots nearby—within a city block." (R. 112). This differs in no material aspect from being on formal leave of absence or pass. In all such instances it is the serviceman's and not the United States' business which is being served.[6] Furthermore, the analogy urged by petitioner is hardly persuasive in view of the fact that servicemen, unlike Western Union messengers, normally wear their uniforms at all times, including periods of leave or furlough.

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[6] These same considerations are dispositive of the argument that in running to catch the train, the sailors were carrying out government orders to go to New Orleans. They were on a train en route to New Orleans (R. 109). Carrying out their orders required that they remain on that train. By leaving that train on an excursion of their own the sailors were serving their own interests. It was only when they reboarded the train that their own personal excursion ended. And this is true whether or not they had permission to leave the train—though petitioner has not alleged or proved that they did have such permission.

CONCLUSION

The decision of the court below is correct and presents no conflict. The petition for the writ of certiorari should therefore be denied.

Respectfully submitted.

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JUNE 1949.

APPENDIX

The pertinent provisions of the Federal Tort Claims Act (60 Stat. 842, 28 U. S. C. 931, 941), provided as follows:[7]

Sec. 402. As used in this title, the term—

* * * * *

(b) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

Sec. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or

[7] See fn. 1, *supra*, p. 2.

wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

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